UNITED STATES SUPREME COURT,

OCTOBER TERM, 1904.

No. 225.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

WEST COAST NAVAL STORES COMPANY,
DEFENDANT IN ERROR.

Certiorari to the Circuit Court of Appeals for the Fifth Judicial Circuit.

Reply Brief of W. A. BLOUNT and A. C. BLOUNT, JR., for Plaintiff in Error, the Louisville & Nashville Railroad Company.

We submit a few observations in reply to the assertions and arguments of the plaintiff.

1.

The plaintiff, on page 2 of its brief, takes occasion to show that the decision of the Circuit Court of Appeals was upon pleadings in which there was an allegation that the wharf in question was at the end of a public street.

Even though this be material, yet it cannot be considered tinhis case. After the case was remanded and sent back to

the Circuit Court the pleadings were amended, and there is no now in the case before this Court any such allegation. If it had been made below, it could have been met by us, by showing authority from the City of Pensacola and from the State of Florida to erect and maintain the wharf. The declaration did not, however, allege the fact, or any other fact rendering it necessary for us to show the character of the title and possession under which we held the wharf and we, therefore, refrained from so doing.

2

In our former brief we said that the plaintiff had not alleged any deprivation of any right which it possessed, but had only alleged that the certain vessels with which it had contracted had been denied access to our wharf and that, therefore, plaintiff. in not showing that it could not be equally well served by other vessels coming to the wharf, did not show any right of action.

To this the plaintiff replies that it alleged that we refused to permit it to ship its stores by the vessels with which it had contracted and that our plea does not allege that there were equal facilities provided by other vessels as would have been furnished by the vessels with which it had contracted.

The plaintiff, however, forgets that the burden of allegation is with it and that the demurrer to the plea relates back to the allegation.

Johnson vs. Pensacola & Perdido R. R. Co., 16 Fla., 623.

Since the plaintiff, itself, was not prevented from carriage of its goods on the wharf or from access to vessels thereat, it was incumbent on it to show not only that it could not ship by certain vessels, but that it could not ship upon any vessels upon the same terms and with equal facilities as upon those certain vessels, for whatever may have been the rights of the "certain vessels," its rights, if any, were to be

secured in its transportation of its goods from Pensacola to the port for which they were destined, with the same facilities with which others were served, and not with the facilities offered by any particular line of vessels with which it chose to contract.

3.

The plaintiff insists that this is a simple case of an ordinary *public wharf* and that its relations to the defendant as a common carrier, entitled not only to serve the public in the way best for the public good, but also to take care of its own interests, must be ignored. As we have shown, this situation cannot be left out of consideration. If, however, we accept the situation as contended for by plaintiff, it has not shown this to be a *public* wharf.

Whether in the absence of statute or custom a public use is impressed upon a given business does not depend upon the question as to how many people may use that business, or how frequent their use, but upon the question whether their use is independent of the use made of it by the owner for his own private purposes, or connected with such private purposes. If the use throws it open to the public with no purpose except to make a profit by such use, then it may be considered public, but if the owner uses it as one of the agencies of his own business, for such persons as may come to him in connection with that business, then it is not public, but private. For illustrations:

An inn-keeper who holds his lodgings open to all who may pay for the use thereof, impresses upon them a public use and must receive all proper persons alike, but the owner of a cotton factory may establish a boarding-house for his employes, for the better transaction of his own business, and may, at his pleasure, keep out such persons as he may desire.

So a person who establishes a wharf and permits all persons who may desire to load their goods thereon, or unload their goods therefrom, or to traverse the same with their

vehicles, for a compensation to be paid to him, has devoted his wharf to the public use and has become a wharfinger. It serves no purpose of his, except to render a return of emolument for the use of it by others.

But if the owner of a saw-mill on land builds in front of it a wharf for the purpose of expediting the communication between his mill and those vessels which may come to take away his goods, he does not make it a public wharf and can keep away such vessels as he may desire to refuse access to. So with the case at bar.

The plea expressly alleges, "That no business has ever been done at said wharf except the transportation by the defendant in cars on its railroad over said wharf, to and from vessels lying at the said wharf, of goods bought, or to be transported, by said vessels and the loading and unloading thereat of such vessels," and that the defendant constructed the wharf "for the purpose of providing facilities for the transaction of its business with such vessels as it might permit to come and lie at said wharf to take cargo."

This is tantamount to saying that the only use of the wharf ever intended or had has been the use by the defendant for the carrying out of contracts of carriage which it had undertaken. No persons, as a matter of right, have ever deposited goods on it, or taken goods from it, or carried goods over it. This has all been done by the defendant, who did it in carrying out his own business. The public has exercised no rights in relation to it. Only those vessels which the defendant thought could best carry out its own business were allowed to approach it and use it. Whether those vessels were or were not numerous, or, as the plaintiff puts it in its brief, "a large part of the public," is entirely immaterial, for their access was not because they were of the public, but because they bore contractual relations with the defendant. It would seem to be impossible for one to have a private wharf at which to carry on his own business, if it cannot be done by erecting

a wharf strictly for that purpose and strictly confining its use to those who should come into contractual relations with him for that purpose.

4.

Outside of the general question which we have discussed is the by far more important one, whether a railroad company having a wharf of necessarily limited facilities for the better conduct of its export business is, because in the carrying out of that business it requires and, therefore, permits, some vessels to come to such wharf, compelled to let every single vessel or line come at any and all times, and thus break up its business and prevent the rendition of export service to the public. We have discussed this in our former brief and need not discuss it again.

The plaintiff says, however, that nothing in the pleadings shows that such circumstances would have ensued in this particular case, or are not merely speculative; in other words, that it is not shown that the presence of the certain vessels contracted with by plaintiff would have prevented or driven off any connections of defendant. But the right does not depend upon the effect in this isolated instance. If the results which we picture could follow and the defendant and the public be injured, then the necessity for the prevention of such possible contingent injury creates the right. In the Express Cases (117 U. S., 1), the Court said, "No express company can do a successful business unless it is ***at all times*** reasonably sure of the means it requires for transportation. On important lines one company will ***at times*** fill all the space one railroad company can well allow for the business. If this space had to be divided among several companies, ***there might be occasions*** when the public would be put to inconvenience by delays which could otherwise be avoided." (The Italics are ours.)

5.

The Court will note that there is very respectable authority for holding that even if the wharf had been a public wharf

the defendant had a right to discontinue its public use at any time and refuse to let any particular individual use it.

O'Neil vs. Annett, 27 N. J. Law, 290;
Heany vs. Heeny, 2 Den , 625;
Bogart vs. Haight, 20 Barb., 251;
Mary K. Campbell, 31 Fed., 840;

6.

The Court will note that the research of the counsel for plaintiff has enabled him to find only one case directly in support of the decision of the Circuit Court of Appeals,—the case of the Indian River Steamboat Company against East Coast Transportation Company, 28 Fla.—and that case is founded upon the Statute of the State of Florida and upon decisions of which this Court explicitly disapproves in the Express Cases, 117 U. S., 1.

Respectfully submitted,

W. A. BLOUNT AND
A. C. BLOUNT, JR.,
Attorneys for Plaintiff in Error.